Office - Supreme Court, U.S.
FILED
FEB 4 1953
HAROLD B. WILLEY, Clerk

GLY-H
18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 584.

GLYCO PRODUCTS CO., INC., *Petitioner,*

v.

FEDERAL SECURITY ADMINISTRATOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL F. MARKEL,
522 Munsey Building,
Washington 4, D. C.,
Attorney for Petitioner.

WAYNE K. HILL,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	5
SPECIFICATION OF ERRORS TO BE URGED	10
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	25

CITATIONS.

CASES:

Federal Security Administrator v. *Quaker Oats Co.*, 318 U. S. 218, 63 S. Ct. 589 (1943) 10, 16-19

Land O'Lakes Creameries, Inc. v. *McNutt*, 132 F. 2d 653 (1943) 16, 22

Libby, McNeil and Libby v. *United States*, 148 F. 2d 71 (1945) 16, 22

Quaker Oats Company v. *Federal Security Administrator*, 129 F. 2d 76 18-19

62 Cases . . . Jam v. *United States*, 340 U. S. 593, 71 S. Ct. 515 (1951) 16

Youngstown Sheet and Tube Co. et al. v. *Sawyer*, 343 U. S. 579, 72 S. Ct. 863 (1952) 23-24

MISCELLANEOUS:

Dunn, Federal Food, Drug, and Cosmetic Act (1938) 13-15

APR 21 1954

205383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. .

GLYCO PRODUCTS CO., INC., *Petitioner,*

v.

FEDERAL SECURITY ADMINISTRATOR, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Glyco Products Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 22, 1952.

OPINION BELOW

The Court of Appeals rendered an opinion (R. p. 757) which is not as yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1952. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the authority to "promulgate regulations fixing and establishing * * * a *reasonable* definition and standard of identity" for a food, conferred upon the respondent by Section 401 of the Federal Food, Drug, and Cosmetic Act, includes authority to specify and limit, by regulation promulgated pursuant to *this* Section, those substances which *need* not, but *may* be added to a standardized food, *not* to achieve economic integrity, but to practice the inherent *culinary art* according to the preferences of the individual food manufacturer; not ultimately included upon the basis of any administrative "judgment" that one or more of these ingredients is in fact required to insure food honesty, but upon the basis of the "judgment" of the regulated food fabricator, or his chef, founded on *their* belief that their customers will prefer this *standard* food when it possesses the organoleptic characteristics imparted to it by the presence therein of such a permitted substance, and, if so—

2. Does the delegation of legislative functions to the respondent by Section 401, as construed by the court below, meet constitutional requirements as to certainty in its delineation of such functions since the administrative action compiling a list of *permissive* ingredients does not rest on considerations of any defineable economic integrity of the food being standardized and since the ultimate decision as to whether one or more of these permissive ingredients should be added to such food is made, not on the basis of administrative judgment, but on the basis of the judgment of the individual food processors and; if constitutional as thus construed—

3. Whether the respondent, in the exercise of his administrative powers under Section 401, defined in most *general* terms, may exclude such ingredients from his list of *permitted* ingredients on the basis of an ultimate conclusion of fact of likely consumer deception or health haz-

ard, in the presence of *specific* and detailed provisions of other sections of the Act *specifically* calculated to protect consumers against these risks and, by electing to standardize a food, dodge Government responsibility for enforcing Sections 402(a)(1) & (2), as supplemented by Section 406, and Section 402(b) of the Act and avoid the Government's statutory burden of affirmative proof of these issues of fact in court to the satisfaction of the judge or jury, at the same time depriving the food manufacturer of his right to have them tried by judge or jury and imposing on him the much greater burden of establishing the *negative* thereof to the *respondent's* satisfaction.

4. Do the respondent's stated grounds for refusing to specify polyoxyethylene monostearate as a permissive ingredient in his regulation, constitute a lawful basis for his administrative action having the legal effect (if his construction of the provisions of Section 401 of the Act be correct) of closing a vast market to this product, since his negative findings of insufficiency of proof are not related to any record supported findings prescribing a reasonably specific standard of adequacy of proof, or reference standard?

STATUTE INVOLVED

The pertinent statutory provisions involved are included in Section 401, Section 402(a)(1) and (2), as implemented by Section 406(a), and Section 402(b), of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), 21 U.S.C. §§ 341, 342(a)(1) and (2), 346(a), and 342(b), as follows—

> "Sec. 401. Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, * * *. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the in-

terest of consumers, designate the optional ingredients which shall be named on the label, * * *."

* * * * * * *

"Sec. 402. A food shall be deemed to be adulterated—

(a)(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 406; * * *."

* * * * * * *

"Sec. 406. (a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) of section 402(a); but when such substance is so required or cannot be so avoided, the Administrator shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) of section 402(a) * * *."

* * * * * * *

Section 402. A food shall be deemed to be adulterated—

(b) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or *make it appear better or of greater value than it is.*" (Italics ours)

STATEMENT

This petitioner challenges the validity of the respondent's order promulgating regulations fixing and establishing definitions and standards of identity for bread and certain other specified bakery products, to the extent to which the administrative action thus taken attempts to deny the further use in such bakery products of polyoxyethylene monostearate, a substance manufactured and marketed by this petitioner and now widely used in many bakery products, including those which are the subject of the challenged order.

The challenged order was issued pursuant to the provisions of Section 401 of the Federal Food, Drug, and Cosmetic Act [52 Stat. 1046 (1938), 21 U.S.C. § 341], quoted in pertinent part above. It is based on the record made at a public hearing, consisting of a series of sessions, held in compliance with the prescribed procedural requirements of Section 701(e) of that Act [52 Stat. 1055 (1938), 21 U.S.C. § 371(e)].

The hearing was commenced pursuant to notice, which included the respondent's proposed regulation, as published in the Federal Register for June 7, 1941 (6 F. R. 2771). However, due to the intervention of war and for other reasons, the hearing was suspended without any fixed date for its resumption. It was resumed in the fall of 1948 pursuant to the respondent's notice as published in the Federal Register for October 14, 1948 (13 F. R. 6024). Reception of evidence pursuant to this second notice was expanded so as to include consideration of certain surface-active agents, including polyoxyethylene monostearate manufactured and marketed by this petitioner, which had come into general use as ingredients for bakery products since the 1941 proposal. The respondent thus brought up for consideration at this hearing the question of suitability of these and other similar substances for use in bread and the other specified bakery products. The petitioner appeared at this public hearing pursuant to said respondent's notice and proposal

and, together with other manufacturers of like products, presented evidence calculated to establish both the safety and suitability of their products as such ingredients.

The record made pursuant to the second notice over a period of about eleven months consists of upwards of 17,000 pages, exclusive of exhibits. The vast majority of this record consists of testimony bearing on the questions of suitability and safety of polyoxyethylene monostearate for use as such an ingredient. Much of this testimony was offered by and through representatives of manufacturers of competing ingredients. The respondent, who had available to him a highly qualified technical staff, presented no evidence on these issues.

The quantity of polyoxyethylene monostearate required in bread to achieve the desired bread characteristics is never in excess of 0.5% (Finding 39). The respondent has found that its function, when so used, is to keep bread *softer* longer (Finding 39). In his proposed Finding 42 (15 F.R. 5107) he found further that such use "may enable consumers to keep such bread longer before it becomes *unpalatable.*" Petitioner contended (and still claims) that it keeps bread *fresh* longer and that preservation of palatability and softness, as found by the respondent, amounted to a finding of preservation of freshness. Rather than debate this question, the respondent changed his mind as to the characteristics produced by our ingredient and changed his final finding to read "may enable consumers to keep such bread longer before it *hardens.*" In any case, while the respondent's findings betray considerable indecision as to the functional properties of our ingredient when used up to 0.5% in bread, he makes no finding showing that such use has any bearing on the "standard of identity" of bread, but rather shows affirmatively that it only imparts organoleptic characteristics to the bread. His regulation fixing and establishing a definition and standard of identity, *requires* only the following—

"§ 17.1. * * * (a) Each of the foods bread, white bread, rolls, white rolls, buns, white buns is prepared by baking *a kneaded yeast-leavened dough, made by moistening flour with water or with one or more of the optional liquid ingredients specified in this section* [the several kinds of milk] *or with any mixture of water and one or more of such ingredients.* * * * *Each of such foods is seasoned with salt*, and in its preparation one or more of the optional ingredients prescribed by subparagraphs (1) to (14), inclusive, of this paragraph *may* be used:

* * * * * *

"Each of such foods contains *not less than 62 percent of total solids,* * * *.*" (Italics ours)

The requirements of the last phrase is another way of saying that these bakery products must not contain more than 38% moisture as a finished product; an essential bread component required to be so limited since retention of excess water in bread is one of the common forms of chiseling and bread adulteration. (Finding 4.)

All ingredients not specified in the quoted part of the standard are *permissive* and may be used, or omitted, as dictated by the *baker's* and *not* the respondent's judgment. Petitioner's product is in the latter category.

This petitioner also challenged the respondent's jurisdiction to resolve the issues of fact raised by his consideration of petitioner's product. Jurisdiction was challenged on the grounds that (a) the functional properties of the petitioner's product had no bearing on the standard of identity as proposed to be fixed for the bakery products under consideration and, (b) the issues thus raised were required to be resolved by a court or jury in proceedings initiated in the enforcement of Sections 402 (a)(1) & (2), as implemented by Section 406, and Section 402(b) of the Act. [Exceptions to proposed order: R. pp. 1a-23a].

The respondent denied our objection to jurisdiction and declined to specify petitioner's product as a *permissive* in-

gredient in his regulation on the grounds specified in Findings 38 to 42 inclusive. They add up to two basic reasons—

(1) That its presence in these bakery products serves to make them appear better or of greater value than they are in that the softness achieved thereby tends to deceive consumers as to the age of bread; and

(2) That "although the record shows no definite evidence of injury from the use of * * * polyoxyethylene monostearate in the amounts in which they are likely to occur in the diet from their use in bread, results of the pharmacological tests reported do not warrant the conclusion that there is no likelihood of injury from bread containing these substances in the amounts proposed to persons consuming it continuously over a life span" (Finding 42); *i. e.*, it has not been established to respondent's satisfaction that such bread may not be dangerous to health.

There should also be noted as part of this statement, the administrative construction of Section 401 and the consequent pattern of food standards, in order to point up the questions here raised and their general importance to the food industry and to consumers.

The respondent has interpreted the provisions of Section 401 to include a grant of power to him to establish, in his regulations fixing and establishing definitions and standards of identity for foods, two classes of optional ingredients: (1) two or more ingredients specified as *mandatory* from which a producer is allowed, at his option, to select but is *required* to use one thereof in order to insure the standard of identity, or standard of economic integrity, fixed and established by the regulation, and (2) a list of ingredients also characterized as "optional", none of which a producer is *required* to use, but which he *may* use, depending entirely on his own wishes dictated by his own judgment as to the organoleptic food characteristics preferred by his customers.

Thus a loaf of bread which, according to the expressed judgment of the respondent, "will promote honesty and fair dealing in the interest of consumers," is one baked from a salted, yeast-leavened dough prepared from one of the kinds of flours specified and baked to a degree so that the finished loaf will not contain more than 38% of moisture. The use of all other ingredients specified is left entirely to the baker's judgment in the practice of his art of baking. A standard fruit preserve need only contain fruit and sugar, or a mixture of sugars, as the essential ingredients in the prescribed ratio and be concentrated to a specified degree so as to prevent excess water. All the remaining ingredients, including vinegar, lemon juice, lime juice, citric acid, lactic acid, pectin, sodium citrate, sodium benzoate and others, are *permissive* and not *required.* (21 C.F.R. § 29.0)[1]

The petitioner challenges the correctness of a construction of the provisions of Section 401 which authorizes promulgation of this type of standard, and, if such be its meaning, the constitutionality of such a broad delegation of administrative power. It contends that the provisions of Section 401 merely authorize the Administrator to *fix* the ingredients required to insure the *identity* of the food under a specified name, and to *establish a standard of identity* for such food by fixing the ratio for these ingredients; that is, by fixing floors for the expensive and ceilings for the cheaper of such required ingredients at levels so as to insure a food of an economic integrity which may reasonably be expected of such food when sold under the specified name.

The petitioner duly filed its petition seeking review of the respondent's said order by the United States Court of Appeals for the Third Circuit. That court affirmed the order by judgment entered on December 22, 1952. It ren-

[1] For a complete list of federal food standards promulgated to date, see 21 C.F.R. Parts 14-53, inclusive.

dered an accompanying opinion in which the questions presented were considered and resolved against this petitioner. The court below rests its conclusions principally, if not solely, on statements included in this Court's opinion rendered in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 63 S. Ct. 589 (1943).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In holding that the respondent's authority by virtue of Section 401 of the Act includes the authority to deny, by administrative action under Section 401, the use of this petitioner's product as an ingredient in the bakery products which are the subject of his order.

(2) In holding that the respondent may lawfully, by virtue of Section 401, determine administratively, and as a basis for his action, factual issues of likely deception and health hazard in the presence of the specific provisions of Section 402(a)(1) & (2), as implemented by Section 406(a), and Section 402(b), specifically calculated to protect consumers against these risks.

(3) In holding that the functions delegated by Section 401, as administratively interpreted, is a constitutional delegation of legislative powers.

(4) In holding that the respondent's stated grounds for his refusal to specify polyoxyethylene monostearate as a permissive ingredient in his regulation, constitutes a valid basis for such administrative action.

(5) In refusing to decide whether the findings with respect to deception alone, or with respect to health hazards alone, constitute an adequate justification for the administrative action of excluding petitioner's product from said bakery products.

(6) In holding that the respondent's conclusion of likely consumer deception reasonably requires that this petition-

er's product be excluded from the bakery products which are the subject of said order, without any finding that such deception may not be overcome by appropriate label designation.

(7) In that it has failed and refused, in the exercise of the jurisdiction conferred upon it by Section 701(f)(3) of the Act, to set aside, permanently, that part of the respondent's order calculated to deny the use of the petitioner's product as an ingredient in the bakery products which are the subject of the challenged order.

REASONS FOR GRANTING THE WRIT

The fundamental issues raised in this case should be finally resolved by this Court in order to settle questions of importance to consumers, food manufacturers, as well as the Government.

I.

It is imperative that the scope of the legislative powers conferred upon the Administrator by Section 401 of the Act be finally determined and delineated by this Court so that all concerned may understand clearly the kind of standards contemplated and, if these be impracticable, the statutory amendments required to insure a practicable program of food standardization.

The legislative history of Section 401 shows that this legislation was in response to Government request as well as demands from consumer groups and from important segments of the regulated industry. Such legislation was said to be necessary in order to enable the Government to enforce the economic adulteration provisions of the old law more effectively and thus to protect food manufacturers against unfair methods of competition resulting from food dilution by chiseling competitors and to protect consumers against the resultant deception, since they could not differentiate, for example, between fruit preserves containing 45% fruit and one containing only 25%.

The existence of the need for administrative food standards for the protection of consumers and honest industry is still recognized today. However, both of these interests have not been afforded the effective protection contemplated because the whole standard-making program has bogged down. This is apparent from the fact that after fifteen years of effort many foods still remain on the list of foods originally scheduled for standardization within two years from the enactment of the law. Several factors have contributed to this situation, including the intervention of war. However, it is generally conceded by those concerned with food standardization that one of the important factors responsible for the development of this situation is the adoption of the administrative policy to promulgate definitions and standards of identity which are, in effect, recipes, rather than standards which will insure the presence in a food sold under a given name, the kind and quantities of ingredients required to conform to the identity expected under that name. The basic questions raised in the case go to the very heart of this problem.

That a serious question does exist as to the correctness of the administrative construction of Section 401 and the validity of the consequent pattern of food standardization followed from the beginning, is amply supported by the legislative history itself.[2] For example, one of the more persuasive arguments before congressional committees was made by producing certain examples of the kind of foods which were regarded as dishonest foods but which could not be reached by enforcement of the adulteration sections of the old law, substantially the same as those of the present law, because of the lack of commercial standards of sufficient certainty so that they could be accepted as legal standards by the courts in enforcement proceedings. The

[2] H. Rep. No. 493, 73d Cong., 2d Sess.; H. Rep. No. 361, 74th Cong., 1st Sess.; S. Rep. No. 646, 74th Cong., 1st Sess.; H. Rep. No. 2755, 74th Cong., 2d Sess.; S. Rep. No. 91, 75th Cong., 1st Sess.; H. Rep. No. 2139, 75th Cong., 3d Sess.

example most frequently referred to and which impressed congressional committees most was a substandard fruit preserve marketed as "Bred-Spred."

The problem thus illustrated and which Congress undertook to reach by enacting Section 401 is probably best pointed up by the testimony of Walter G. Campbell, then the Chief of the Food and Drug Administration. On December 7, 1933, he testified before a sub-committee of the Senate Committee on Commerce in part as follows—

> "Here is a product labeled 'Bred Spred' which has the appearance of a preserve. Investigation of the retail market showed that it was actually sold as a preserve or as a jam, but it contains less than one-half the amount of fruit required by the standard recognized by the Department for such products. The sale to the public of an article of this sort, bearing in mind that the most expensive ingredient in jams and preserves is the fruit content, is obviously a fraud upon the public. To the extent that such products can be prepared and sold, containing less than one-half the amount of fruit expected by the purchaser, used by manufacturers generally and established as a trade custom, it likewise deprives the farmer of a legitimate market for his fruit.
>
> "Compare the article marked as 'Bred Spred' with this standard jam or preserve, which contains the full 45 percent of fruit required. Their appearance is identical. They are sold in glass containers which characterize this class of products; and I submit to you that the consumer, even though a discriminating buyer, in almost every instance would be perfectly willing to accept either as a pure preserve. As a matter of fact, the price for which the article known under the distinctive name 'Bred Spred' was sold, was only slightly less than that of the product sold under the label of pure preserves."[3]

Later, Mr. Campbell illustrated the same point by another example. He said—

---

[3] Senate Hearings on S. 1944, 73d Cong., 2d Sess.; *Dunn*, Federal Food Drug, and Cosmetic Act, p. 1052.

"MR. CAMPBELL. * * * We have a number of exhibits here. I regret to take up so much time because I know how anxious you are to expedite this hearing, but I think I have here something that should be brought to your attention, Mr. Chairman. *These are samples of a mixture of chicken and noodles. Notice the variation in the amount of the meat, the expensive part of it. You see it ranges from 9 percent to 15⅔ percent.*

"THE CHAIRMAN. That is the percentage of meat?

"MR. CAMPBELL. Yes, you can see what this means to the consumer from the economic standpoint and also to the manufacturer who wants to maintain a definite standard. This shows exactly what competitive pressure will cause manufacturers to do. There is no way by which we can require a definite standard now. * * * "[4]

That the Congress was obviously impressed by this type of testimony and the exhibits displayed at the Committee hearings, is apparent from numerous statements in the various reports accompanying recommended bills[5] of which the following are typical—

" * * * The Government repeatedly has had difficulty in holding such articles as *commercial jams* and *preserves* and many other foods, to the time-honored standards employed by *housewives* and reputable manufacturers. The housewife makes preserves by *using equal parts of fruit* and sugar. The fruit is the *expensive* ingredient, and there has been a tendency on the part of some manufacturers to use *less and less fruit* and *more and more sugar.*

"*The Government has recently lost several cases where such stretching in fruit was involved because the Courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law. By authorizing the establishment of definitions and standards of identity this bill meets the demands of legitimate industry and will effectively prevent the chiseling*

[4] *Ibid.*, pp. 1075-6.

[5] *Supra*, footnote 2.

operations of the small minority of manufacturers, will in many cases expand the market for agricultural products, particularly for fruits, and finally will insure fair dealing in the interest of the consumer."[6] (Emphasis ours.)

* * * * * *

"While the old law has been of incalculable benefit to American consumers, it contains serious *loopholes* and is not sufficiently broad in its scope to meet the requirements of consumer protection under modern conditions. *In considering the measure the committee had before it a host of exhibits and examples of abuses of the consumer's health and pocketbook, against which there is now no effective restriction or no restriction at all."*[7] (Emphasis ours)

It is respectfully submitted, therefore, that both the language of Section 401 and its legislative history raise the gravest doubts as to the correctness of the administrative construction of this Section.

The court below has expressly recognized the public importance of this fundamental question. It questions the propriety of our challenging the Administrator's jurisdiction since, in the lower court's view, this petitioner had waived the right to do so by appearing at the public hearing and requesting that its ingredient be specified as a permissive ingredient.[8] The significance of this is the fact that the lower court concluded that the importance of the question involved outweighed this supposed irregularity. It said in part—

"However, the issue before us is the validity and effect of an administrative regulation of nation-wide appli-

---

[6] H. Rep. No. 2139, 75th Cong., 2d Sess.; *Dunn, op. cit., supra,* p. 819.

[7] H. Rep. No. 2755, 74th Cong., 2d Sess.; *Dunn, op. cit., supra,* p. 552.

[8] This petitioner did not invoke, but rather submitted to the respondent's jurisdiction, but challenged it from the beginning; furthermore, it is elementary that jurisdictional and constitutional questions may be raised at any stage of a proceeding.

> cation to the food industry and of general importance to consumers. In the light of all of the interests involved we think possible inconsistencies in the position of the petitioner should not prevent us from considering and adjudicating * * *", this question. (Opinion p. 3).

In resolving this fundamental question against us, the court below relied almost altogether on statements contained in the opinion rendered by this Court in *Federal Security Administrator* v. *Quaker Oats Co.*, 1943, 318 U. S. 218. It also cited *Libby, McNeil and Libby* v. *United States*, 1945, 148 F. 2d 71, and *Land O'Lakes Creameries, Inc.*, v. *McNutt*, 1943, 132 F. 2nd, 653. However, the latter two cases themselves rest altogether on the language contained in this Court's opinion in the *Quaker Oats* case, at least to the extent to which they have any bearing on the questions here raised. Hence, for all practical purposes, the lower court rests its decision altogether on the *Quaker Oats* case.

By thus resting decision on the *Quaker Oats* case, the court below has raised the further important question of the meaning of that opinion. It is deemed important that this Court finally settle the question by precisely delineating the issues involved in the *Quaker Oats* case and restate precisely its holding therein. The reason for this suggestion is the fact that the *Quaker Oats* case is, in our opinion, one of the most widely misread cases of any we know. This stems from the fact that the opinion contains very broad statements which are meaningful and important determinations of fundamental questions when related to the issues before this Court for decision, but which lend themselves to distortion and misinterpretation when lifted out of context. This Court considered and so characterized one example of such misreading in the so-called "Imitation Jam" case (*62 Cases . . . Jam* v. *United States*, 340 U.S. 593, 71 S. Ct. 515 (1951)). It is important, therefore, that this Court finally decide whether the court below was correct in

concluding that the *Quaker Oats* case is decisive of the questions here raised, or whether, as we contend, these questions were not even before this Court in that case.

At the risk of appearing presumptious, but in the belief that this phase of our question will be clarified and underscored by our so doing, we shall undertake to analyze this Court's decision in the *Quaker Oats* case. As appears from the opinion in that case, the Administrator established standards of identity under the names "farina" and "enriched farina" respectively. The evidence before him on the issues raised by his proposal to fix and establish these standards, established certain basic facts, including: that a general dietary deficiency existed among a substantial portion of the consuming public in certain specified vitamins and minerals; that consumers preferred vitamin and mineral enriched foods; that there was no uniformity of commercial practice in enriching basic foods since most contained only one or the other of these substances; and that consumers were ignorant of the dietary values of these substances, hence were confused.

On the basis of this kind of factual background, the Administrator established a standard for "enriched farina" by fixing both the *kind* and the *levels* of vitamins and minerals which should be contained in any farina held out as having been nutritionally improved—"enriched." Vitamin D alone could not be added to farina since its presence would constitute the product a nutritionally improved farina—an "enriched farina"—which would fail to meet the standard for such a food in that it was lacking in the vitamins and minerals required to be present in a farina held out as nutritionally improved. Any label statement explaining the extent of departure from the standard would not serve to correct the legal defect resulting from the failure to meet the standard. This is in no way different in principle from fixing the kind and amount of fruit required in a fruit preserve, or the kind and quantity of constituents of any other food identified by a given name.

The validity of these regulations was successfully challenged before the United States Court of Appeals for the Seventh Circuit (*Quaker Oats Company* v. *Federal Security Administrator*, 129 F. 2d 76). The *assigned ground* for the attack on them was that the factual consideration as outlined above did not bear any relation to "honesty and fair dealing in the interest of consumers." The lower court accepted the Government's statement of the question as follows—

> "The real issue, of course, is whether the requirements of the regulation are reasonably related to the promotion of consumers' interests * * *." [129 F. 2d at p. 81]

It then continued, saying—

> "A study of the record leaves no room for doubt but that the hearing revolved largely around consumer interest as it related to health. In referring to the ingredients of enriched farina, it is stated in the respondent's brief: 'They are essential to the health and well being of our Nation.' In support of the regulations it is also suggested that they will prevent confusion among consumers as to their nutritional needs * * *. It is still further suggested that the regulations will promote consumer understanding of the relative value of enriched and natural foods." [129 F. 2d at p. 81]

After a detailed consideration of the statute, its legislative history, the findings and evidence relied upon, and acknowledgment that it could not substitute its judgment for that of the Agency, that court concluded—

> "The rule, however, is of no benefit to respondent in the instant situation because, as we have endeavored to show, the regulations, while purporting to be in the interest of consumers, do not promote honesty and fair dealing in their behalf. On this statutory requirement, essential to respondent's authority to act, the record is wholly deficient. In view of this situation,

> the action of respondent, in promulgating the regulations in controversy, was beyond his statutory authority. Such being the case, they must be set aside." [129 F. 2d at p. 83]

It should be noted that the health considerations in this order were to *promote* healthy diets in a field where dietary deficiencies existed, and not to make decisions of *food adulteration* by reason of possible health hazards resulting from an adulterated food.

It is apparent that decision in the lower court as to the Administrator's authority to promulgate the regulations under review, turned on the question whether the considerations of promotion of public health and minimizing of consumer confusion, as outlined above, bore any reasonable relation to promotion of "honesty and fair dealing in the interest of consumers." That court concluded they did not. This is important because this was the primary, if not sole, issue brought before the Supreme Court for review. This Court said—

> "Respondent [Quaker Oats Co.] challenges the validity of the regulations *on the grounds sustained below* and others so closely related to them as not to require separate consideration." (Emphasis added) [318 U. S. at page 224]

It seems clear to us that the questions now presented were *neither raised nor decided* by this Court in the *Quaker Oats* case. The court below disagrees. It seems to us of utmost importance that this issue be resolved by this Court.

II

It is also imperative that this Court consider and determine the constitutional questions raised.

As noted from reading it, Section 401 divides itself into two parts. The Administrator must first decide whether a standard should issue. This decision is required to rest on his judgment that promulgating a standard "will

promote honesty and fair dealing in the interest of consumers." Having thus decided that a standard should issue, he is enjoined by Congress to be "reasonable." That is all! This certainly is about as general as any delegation of legislative power could possibly be. The court below comes to the conclusion that this is sufficiently specific because of the inherent problems involved in food standardization, which do not lend themselves to a more specific statutory delineation. However, it is highly questionable whether this constitutes an adequate yardstick even when the statute is construed as we have proposed.

A reasonably good case can be made for a sufficiently specific delineation of legislative powers granted by this Section when its language is interpreted in the light of the statutory pattern of which it is a part, including Sections 402 and 406, and their legislative history. Such a construction, we contend, authorizes the respondent to fix the ingredients required to insure identity of a food and to fix their ratios in order to establish its standard of identity —its economic integrity—by insuring, for example, 45% of fruit in fruit preserves and 15% of chicken solids in chicken soup. However that may be, the court below has not even undertaken to consider the more specific question of constitutionality which we have raised, and which is inherent in the administrative construction of Section 401, namely, the power to fix and limit by a prescribed list, those ingredients which are *permissive*, but not *required* to insure a standard economic integrity; where the ultimate judgment of inclusion or exclusion of one or more of the listed ingredients is exercised, *not* by the Administrator but by the *food processor*. It seems to us that if Section 401 does in fact authorize such administrative action, this would indeed be a case of "delegation running riot." It would constitute a delegation of administrative powers with the power of *sub-delegation* of some of the functions to the food processor. We respectfully submit that a question of such fundamental implications should be resolved by this Court.

III

Our third question, too, raises a fundamental issue of vital importance to the whole regulated food industry. As pointed out, the administrative action excluding this petitioner's ingredient from the bakery products standardized, involves two basic factual questions, namely, whether this ingredient *may be dangerous to health* and whether the characteristics imparted to bread by its presence therein *make that bread appear better or of greater value than it is*. However, if either of these questions is answerable in the affirmative then our ingredient is already outlawed by operation of law, since bread containing an ingredient possessing such properties, has been proscribed by Congress in enacting Sections 402(a) and (b) of the Act. Congress has left no room for administrative discretion in this matter since it has already declared foods containing such ingredients to be outlaws of commerce. It has only enjoined the Administrator to enforce these provisions of the law when he believes these to be the facts.

Congress has also prescribed the means of enforcement by authorizing seizure of the food so adulterated, enjoining manufacturers from shipping such adulterated foods, and criminal prosecution of the shipper in interstate commerce of such adulterated foods. Inherent in these proceedings is the requirement that the Government establish the affirmative of the issues of fact of alleged adulteration, by a preponderance of evidence in civil proceedings and beyond a reasonable doubt in criminal proceedings, to the satisfaction of a judge or jury. This petitioner contends that the Administrator may not deprive it, or any food manufacturer, of these rights and place it in a position of having to establish the *negative* of those issues to *his* satisfaction, merely by electing to hold a food standard hearing. The viscousness from the standpoint of a regulated manufacturer of such a construction is best illustrated by the case at bar. The respondent has, himself, found as a fact that

there is no evidence of injury to health from the consumption of bread over a life span containing our ingredient in the quantity specified. He has, therefore, expressly given us the reason why he did not undertake to enforce the applicable statute, namely, that there is no available evidence recorded *anywhere,* including upwards of 10,000 pages of transcribed testimony on the issues, to establish the proof required of the Government to establish likely health hazard. He, therefore, held his hearing and now insists that we have failed to establish the *negative* of this issue to *his* satisfaction.

The court below disposes of this vital question by relying on cases in two of which the factual background provided a basis for raising this question, but where it was neither raised nor decided. We have already shown that this question was not involved in the *Quaker Oats* case, the principal case relied on also on this issue, and could not even have been raised since no questions of adulteration were there involved. We happen to know that in *Libby, McNeil and Libby* v. *United States,* 1945, 148 F. 2d 71, another of the three cases relied on, the questions here raised were intentionally omitted because it was desired to restrict argument to the question of whether a wholesome food *truthfully labeled* could constitutionally be denied the channels of interstate commerce. That court stated this as the question before it for decision. Nor was the question raised or decided in *Land O'Lakes Creameries, Inc.* v. *McNutt,* 1943, 132 F. 2d 653, the only other case cited. There the attack on that regulation was not by the regulated industry, which could not have raised our question because no such issue was resolved against it, but by a competitor in no wise restricted by that regulation. The competitor contended that the regulation fixing a standard for oleomargarine was invalid because it provided a basis for practicing unfair methods of competition in that it authorized misbranding and adulteration of margarine in violation of Sections

402(b) and 403(c) of the Act. It was held that the challenged regulation was not invalid on this ground.

The question here raised is novel and of great importance. It may not be brushed aside lightly by the suggestion, as the court below has suggested, that our reasoning "lends itself to the *reductio ad absurdum* type of refutation." The court suggests that "logically petitioner would not let the Administrator challenge even the addition of a bit of arsenic to bread as inconsistent with any proper standard of identity or subject to control under the procedure for food standardization prescribed in Section 401." (Opinion page 5) The court is quite correct in its interpretation of our contention. However, unfortunately it has not seen fit to reply to the answer which we gave to this very question on oral argument. We continued by saying that we by no means meant to imply that he should not concern himself with questions of the presence of arsenic in bread. We suggested that, on the contrary, this should become his primary concern and that he should afford the consumer the best and most expeditious protection provided by Congress, namely, prompt enforcement of Section 402—seizure, injunction, criminal prosecution. Consumers' interests would indeed be poorly served if reliance were placed on the promulgation of standards under Section 401 to protect him against arsenic in bread.

We submit that, at best, a grave question exists as to whether the regulated industry may be deprived of the important rights which it has under those provisions of the law specifically calculated to protect consumers against the specified health hazards and deceptions, by a statutory interpretation resting on inferences drawn from unusually general language. We suggest that this Court's holding in *Youngstown Sheet and Tube Co.*, et al. v. *Sawyer*, 343 U. S. 579, 72 S. Ct. 863 (1952), is applicable here, and particularly applicable is the following statement included in Mr. Justice Frankfurter's concurring opinion in that case—

> *"It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.* To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress." (Italics ours)

IV.

A final question which, in our judgment, requires consideration by this Court is the question raised by this petitioner in challenging the legality of the respondent's stated grounds for the exclusion of this petitioner's ingredient. As noted, the respondent finds affirmatively that there is no ~~likelihood~~ evidence of injury from bread containing this ~~tioner's~~ ingredient as proposed, but he nevertheless excludes it on the ground that "the results of the pharmacological tests reported do not warrant the conclusion that there is no likelihood of injury from bread containing these substances in the amounts proposed * * *." (Finding 42). The respondent noted as part of his findings that substances, including polyoxyethylene monostearate, were proposed as ingredients for salad dressing in 1947 and that his final order in that proceeding excluded them and "pointed out among other things that these compounds had not been adequately tested to determine their safety." (Finding 41). Since the evidence presented to him in 1947 was thus characterized by him, a mass of additional evidence was presented on these issues in the instant hearing, upwards of 10,000 pages of transcript of testimony. Yet, the worst he can find is that there is *no* evidence of injury, but that the tests are not enough. It has been said that

negative findings serve as an escape hatch for indecision. Here is indeed a good example.

This petitioner contends that the respondent's findings do not establish a valid basis for denying its product as an ingredient in bread on the ground of insufficiency of pharmacological tests, unless the finding of inadequacy is related to a specific standard of adequacy, spelled out specifically by affirmative findings of fact based on the record. The food industry is entitled to a definite yardstick whereby it may determine *sufficiency*, in the presence of a finding of *insufficiency*.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. MARKEL,
Counsel for Petitioner

Of Counsel:

WAYNE K. HILL